MINCHUMINA HOMEOWNERS ASSOCIATION ET AL.

IBLA 84-392; IBLA 85-312
IBLA 85-337; IBLA 86-362 Decided August 15, 1986

Appeals from decision of Juneau Area Director, Bureau of Indian Affairs, issuing certificate of eligibility as Native group. AA-11184.

Appeals dismissed; hearing ordered.

1. Alaska Native Claims Settlement Act: Appeals: Generally -- Rules of Practice: Appeals: Dismissal -- Rules of Practice: Appeals: Timely Filing

   The Board will dismiss an appeal challenging a Native group eligibility determination by the Bureau of Indian Affairs made pursuant to sec. 14(h)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(2) (1982), where the appeal was filed more than 30 days after the appellant received notice of the determination.

2. Alaska Native Claims Settlement Act: Appeals: Standing -- Alaska Native Claims Settlement Act: Conveyances: Native Groups -- Rules of Practice: Appeals: Standing to Appeal

   In order to establish standing to appeal a Native group eligibility determination by the Bureau of Indian Affairs made pursuant to sec. 14(h)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(2) (1982), an appellant need not assert a property interest in land selected by the Native group, but need only assert that he is adversely affected by the eligibility determination by virtue of his use of the selected land.

3. Alaska Native Claims Settlement Act: Conveyances: Native Groups -- Hearings -- Rules of Practice: Appeals: Hearings

   Where the appellants have raised material issues of fact regarding a Bureau of Indian Affairs decision to issue a certificate of eligibility to a Native group which has

selected land pursuant to sec. 14(h)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(2) (1982), the matter will be referred for a hearing before an Administrative Law Judge and appellants will have the burden of establishing by a preponderance of the evidence that the eligibility determination is in error.

APPEARANCES: Richard H. Collins, president, and Phyllis M. Tate, secretary, Minchumina Homeowners Association, for Minchumina Homeowners Association; Thomas L. and Pamela F. Green, pro sese; Jack M. and Sherri A. Hayden, pro sese; Kelly A. McMullen, pro se; Mary H. McGee, pro se; Charlotte J. McMullen, pro se; Catherine S. Blair, pro se; Gwenn Davies-Guy, pro se; Gary Guy, pro se; Michael J. Carey, pro se; M. D. Hansen, pro se; Wanda M. Van Hoomissen, pro se; Lyman and Geraldine Benshoof, pro sese; Dale J. Walther, pro se; David A. Koester, pro se Karyn M. Ellingson, pro se; Judilee Jantz, pro se; Paul B. Haggland, Jr., pro se; Hans C. S. Nielsen, pro se; Lila May King and Lena Phipps, pro sese; Kenneth H. Murray, pro se; Mr. and Mrs. Jeffrey Coe, pro sese; Paul E. and Johnnie H. Stutzmann, pro sese; Caroline C. Venusti, pro se;
Walter B. and Patricia I. Parker, pro sese; James and Marianne Ude, pro sese; Robert J. Thompson, president, and Jane K. Thompson, vice president, Minchumina Natives, Inc., for Minchumina Natives, Inc.; M. Francis Neville, Esq., Assistant Attorney General, State of Alaska, for the State of Alaska; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Indian Affairs.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

The Minchumina Homeowners Association (MHA) and others have appealed from a decision of the Juneau Area Director, Bureau of Indian Affairs (BIA), dated April 28, 1983, issuing a certificate of eligibility to Minchumina Natives, Inc. (MNI), as a Native group. Because of the substantial similarity of legal and factual issues involved, we hereby consolidate the various appeals from the April 1983 decision of the Area Director, BIA.

On March 4, 1976, MNI filed a Native group selection application (AA-11184) for 2,240 acres of land within the Lake Minchumina area, pursuant to section 14(h)(2) of the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. § 1613(h)(2) (1982), and 43 CFR 2653.6 (1975). 1/ Notice of the filing of the selection application was not published in the Federal Register. 2/ The selection application indicates that MNI is composed of

1/ The selection application described approximately 2,546.88 acres of land, which constituted MNI's preferred selection, and approximately 5,047 acres of land, which constituted MNI's alternate selection. MNI stated that its selection included "any and all lands listed therein as exclusions because of an alleged valid existing right; provided, such claim is subsequently determined to be invalid, as evidenced by denial of title thereto by the United States."

2/ We note that, in accordance with 43 CFR 2653.6(a)(3), which was promulgated effective Apr. 29, 1976 (41 FR 14739 (Apr. 7, 1976)), BIA is now

seven members who actually reside on the requested land and constitute the majority of residents in "that locality."

On December 10, 1982, a BIA realty specialist certified the accuracy of a field investigator's report, which assessed MNI's application for eligibility as a Native group. The report determined that MNI's "locality" lies within portions of secs. 7 and 18, T. 12 S., R. 24 W., and secs. 12 and 13, T. 12 S., R. 25 W., Fairbanks Meridian, Alaska, and that, on April 1, 1970, five of MNI's seven members claimed the locality as their primary place of residence. In his April 1983 decision, the Juneau Area Director, BIA, issued a certificate of eligibility to MNI as a Native group, based on the field investigator's report and findings of fact and a recommendation by a BIA claims examiner. The Area Director, BIA, stated that an appeal from his decision might be taken to the Board, but that a notice of appeal "must be filed * * * within thirty (30) days of the receipt of this decision." Notice of the decision was published in the Fairbanks Daily News-Miner, a newspaper, on December 11, 18, and 26, 1984, and January 2, 1985.

On March 29, 1984, MHA filed a notice of appeal of the April 1983 decision of the Area Director, BIA, contending that MNI did not meet the criteria for eligibility as a Native group and that MNI's selection application had failed to comply with 43 CFR 2653.6(a)(2). The notice of appeal was dated March 27, 1984, and was ratified by a majority of the members of MHA in a March 28, 1984, meeting. This appeal was docketed as IBLA 84-392. MHA subsequently filed another appeal, docketed as IBLA 85-312, on January 16, 1985, purportedly in order to protect its appeal rights should the original appeal be dismissed.

Between July 17, 1984, and January 17, 1985, numerous non-Native residents of the Lake Minchumina area similarly filed appeals from the April 1983 decision of the Area Director, BIA. 3/

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fn. 2 (continued)
required to publish notice of the filing of an application for a determination of eligibility as a Native group in the Federal Register and to afford a time period for the filing of protests to the application.

3/ These other 34 appellants are listed as follows: Thomas L. and Pamela F. Green, Jack M. and Sherri A. Hayden, Kelly A. McMullen, Mary H. McGee, Charlotte J. McMullen, Catherine S. Blair, Gwenn Davies-Guy, Gary Guy, Michael J. Carey, M. D. Hansen, Wanda M. Van Hoomissen, Lyman and Geraldine Benshoof, Dale J. Walther, David A. Koester, Karyn Marie Ellingson, Judilee Jantz, Paul B. Haggland, Jr., Hans C. S. Nielsen, Lila May King and Lena Phipps, Kenneth H. Murray, Mr. and Mrs. Jeffrey Coe, Paul E. and Johnnie H. Stutzmann, Caroline C. Venusti, William D. Green, Walter B. and Patricia I. Parker, and Marianne and James Ude. Their appeals were docketed as IBLA 85-313 through IBLA 85-337, and IBLA 86-362. We note that attached to MHA's March 1984 notice of appeal was a list of those individuals on behalf of whom the appeal was being prosecuted. The list included Paul B. Haggland, Jr., Thomas L. and Pamela F. Green, and Jack M. and Sherri A. Hayden. In an amended list, dated Apr. 25, 1984, Paul B. Haggland, Jr., does not appear.

By order dated August 20, 1984, the Board granted a motion filed August 13, 1984, by the State of Alaska to intervene as a party in the appeal docketed as IBLA 84-392, in order to challenge MNI's eligibility as a Native group. The State, in its motion, asserted that it had selected land sought by MNI. The record indicates that on November 27, 1961, as amended April 25, 1963, the State had applied to select approximately 48,637 acres of land, including land subsequently selected by MNI, 4/ pursuant to selection application F-28722. By decision dated September 11, 1963, BLM tentatively approved the State selection.

Between May 30, 1984, and March 18, 1985, the Office of the Regional Solicitor, on behalf of BIA, filed motions to dismiss the various appeals involved herein because of either untimely filed notices of appeal or statements of reasons or for lack of standing to prosecute an appeal. On November 26, 1984, the Regional Solicitor filed a motion to dismiss the State as a party because the underlying appeal (IBLA 84-392) was subject to dismissal and because the State's independent right to pursue an appeal was barred by the untimeliness of its appeal. The Regional Solicitor has also requested, in the alternative, that the Board should either affirm the April 1983 decision of the Area Director, BIA, or refer the matter of MNI's eligibility for a fact-finding hearing.

The Regional Solicitor argues that the appeals of MHA, the Greens, the Haydens, Carey, Haggland, and the Udes (IBLA 85-312, 85-313, 85-314, 85-321, 85-329, and 86-362) were untimely because these appellants were aware of the April 1983 decision of the Area Director, BIA, more than 30 days prior to the filing of their notices of appeal. We agree.

[1] The applicable regulation, 43 CFR 4.411(a), provides that a "person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service." In the case of Carey, whose notice of appeal was filed January 14, 1985, the Regional Solicitor refers to an April 18, 1984, letter from Carey to BLM which states that MHA had received the April 1983 decision of the Area Director, BIA. Similarly, in the case of the Greens, the Haydens, and Haggland, whose notices of appeal were filed July 17, 1984, and January 10, 1985, the Regional Solicitor refers to a statement attached to MHA's original notice of appeal (IBLA 84-392) which challenges the April 1983 decision of the Area Director, BIA, and is signed by these appellants as well as other members of MHA. The statement states that "we were unaware of said determination [of eligibility] until March 5, 1984." The Udes filed their notice on February 20, 1985. The Regional Solicitor points out that the Udes stated that they received notice of the decision on publication in the newspaper. The latest publication was January 2, 1985. Accordingly, the Udes' notice of appeal was due on February 1, 1985, at the latest. It was not mailed until February 8, 1985. Finally, in the case of

4/ The land selected by MNI, which was also subject to State selection F-28722, was designated as part of MNI's preferred selection and is described as secs. 22, 26, 27, 33, 34, and 36, and the SW 1/4 SW 1/4 sec. 25, T. 11 S., R. 24 W., and sec. 4, T. 12 S., R. 24 W., Fairbanks Meridian, Alaska, with the exception of Lake Minchumina.

MHA's second appeal (IBLA 85-312), filed January 16, 1985, the Regional Solicitor refers to the earlier appeal as evidence that MHA had notice of the decision being appealed more than 30 days prior to filing its appeal.

We agree with the Regional Solicitor that the appellants in the six cases discussed above had actual notice of the April 1983 decision of the Area Director, BIA, more than 30 days prior to filing their notices of appeal and for this reason the appeals must be dismissed as untimely. See Sharon Long, 83 IBLA 304, 307 (1984); Nabesna Native Corp., Inc. (On Reconsideration), 83 IBLA 82 (1984). Accordingly, we hereby grant the Regional Solicitor's motions to dismiss in these cases.

The Regional Solicitor also moved to dismiss the appeals of Mary M. McGee, IBLA 85-316; Charlotte J. McMullen, IBLA 85-317; M. D. Hansen, IBLA 85-322; Wanda M. Van Hoomissen, IBLA 85-323; Caroline C. Venusti, IBLA 85-335; and William D. Green, IBLA 85-336, because these appellants have failed to file a statement of reasons as required by 43 CFR 4.412(a). Because these appellants have neither filed a statement of reasons nor explained their failure to do so, we hereby dismiss these appeals pursuant to 43 CFR 4.402. George L. Clay Lee, 70 IBLA 196 (1983).

[2] The initial concern in the remaining cases is the question of standing. Standing to appeal to the Board of Land Appeals from decisions of other Departmental officials is generally governed by 43 CFR 4.410, which sets forth two tests for standing. That regulation provides in subsection (a) that, with certain exceptions, standing to appeal from a decision "of an officer of the Bureau of Land Management or of an administrative law judge" will be accorded to "[a]ny party to [the] case who is adversely affected by [the] decision." In the present case, the decision being appealed was made by an officer of BIA, not BLM. Thus, 43 CFR 4.410(a), is not, on its face, applicable. The other test for standing is set forth in subsection (b), which provides that standing to appeal from decisions "rendered by Departmental officials relating to land selections under the Alaska Native Claims Settlement Act, as amended" will be accorded to "any party who claims a property interest in land affected by the decision." This regulation which relates to land selections under ANSCA is also, strictly speaking, not applicable in the present case because it involves a decision which relates to MNI's eligibility status as a Native group. The fact that eligibility determines MNI's right to select land under section 14(h)(2) of ANCSA does not technically bring it within the purview of 43 CFR 4.410(b), since eligibility is an issue to be resolved separate and apart from the actual land selection process.

Thus, 43 CFR 4.410 presents an apparent regulatory conundrum regarding the applicable test for standing, which we conclude is properly solved by analyzing the development of the standing regulations. At the time of enactment of section 14(h)(2) of ANCSA on December 18, 1971, appeals from decisions of Departmental officials were governed in part by Ad Hoc regulations regarding standing, i.e., 43 CFR Part 4, Subpart G, which accorded standing to "[a]ny party aggrieved by an ajudicatory action or decision of a Departmental official." 43 CFR 4.700 (1972). Appellate decisions were made by the Director, Office of Hearings and Appeals (OHA), or an Ad Hoc Appeals Board appointed by him. 43 CFR 4.704 (1972). The regulations also provided that either the Director or the board "may direct a hearing." Id.

Effective July 2, 1973, the Department first promulgated final regulations specifically governing land selections under ANCSA (43 CFR Part 2650 (1973)), including Native group selections (43 CFR 2653.6 (1973)). The regulations formally provided for appeals to an Ad Hoc Board personally appointed by the Secretary, which appeals would be "governed by the applicable regulations in Part 4, subpart G of this title." 43 CFR 2650.8(b) (1973). The decisions of the Board were to be "submitted to the Secretary for his personal approval." Id. The regulations set forth a specific procedural mechanism for determining the eligibility of Native villages, which were also entitled under ANCSA to make selections, but set forth no mechanism with respect to determining the eligibility of Native groups. See 43 CFR 2651.2 (1973). Nevertheless, it is instructive to review this procedure. Proposed decisions by BIA regarding the eligibility of a Native village were to be published in the Federal Register and subject to protest by "any interested party." 43 CFR 2651.2(a)(2) (1973). BIA would then render a final decision which could be appealed to the Ad Hoc Board. 43 CFR 2651.2(a)(5) (1973). These appeals would, likewise, be "governed by the applicable regulations in Part 4, subpart G, of this title," and the decisions of the Board were to be "submitted to the Secretary for his personal approval." Id. Under these rules, numerous third parties challenged Native village eligibility determinations, which were adjudicated by the Ad Hoc Board, later named the Alaska Native Claims Appeal Board (ANCAB). See, e.g., Holdsworth v. Village of Chitina, ANCAB No. VE 74-10 (June 14, 1974); Alaska Wildlife Federation & Sportmen's Council v. Natives of Afognak, Inc., ANCAB No. VE 74-7 (June 14, 1974). In Department of Natural Resources, State of Alaska v. Village of Manley Hot Springs, ANCAB No. VE 74-6 (June 14, 1974), at 8, ANCAB specifically recognized non-Native residents as having standing under 43 CFR 4.700 (1972):

> The other appellants are all non-Native residents of Manley Hot Springs. While their interest is not so clearly recognizable as that of the State of Alaska, they are living in a community surrounded by public lands upon which they hunt, fish, and trap. Transforming a substantial portion of the surrounding public lands to private ownership may have a substantial effect upon their life styles. If this were a zoning case, they, as potential adjoining land owners, would be recognized as interested parties for the purposes of an appeal. The Board therefore concludes that all appellants in this proceeding have standing.

On March 26, 1975, the Department, recognizing that "[v]illage eligibility hearings were completed under the present regulations," and apparently concluding that only the land selection process remained, proposed revision of the Native village eligibility appeal regulation to formally provide for appeal to ANCAB "in accordance with Subpart 2655 of this chapter." 43 CFR 2651.2(a)(5) (40 FR 13309 (Mar. 26, 1975)). 5/ In 43 CFR 2655.2 (40 FR 13309

5/ An associated proposed regulation change also established ANCAB formally as a separate Appeals Board within the Office of Hearings and Appeals by modifying the regulation at 43 CFR 4.1 to include ANCAB. 40 FR 13308 (Mar. 26, 1975).

(Mar. 26, 1975)), the Department proposed a new test of standing: "Any party with a property interest in land affected by determination from which an appeal to [ANCAB] is allowed * * * may appeal." ANCAB was to be generally accorded the authority to render final decisions for the Department with respect to matters arising under ANCSA, but "appeals from decisions on village eligibility shall be personally approved by the Secretary." 43 CFR 2655.1(a) (40 FR 13309 (Mar. 26, 1975)). Effective August 6, 1975, the Department adopted the proposed rules in a substantially unchanged form, although the procedural regulations referenced in 43 CFR 2651.2(a)(5) were redesignated 43 CFR Part 4, Subpart J. See 40 FR 33172 (Aug. 6, 1975). The test of standing was amended to accord standing to any party "who claims a property interest in land affected by a determination from which an appeal to [ANCAB] is allowed." 43 CFR 4.902 (40 FR 33173 (Aug. 6, 1975)). There is no suggestion in the preamble to either the proposed or final rulemaking that the Department intended to apply the stricter "property interest" test of standing in the case of Native village eligibility determinations, which had apparently already been made and presumably appealed.

Effective April 29, 1976, the Department promulgated regulations with respect to Native group eligibility determinations patterned after the regulations concerning Native village eligibility determinations. See 41 FR 14739 (Apr. 7, 1976). 43 CFR 2653.6(a)(7) provided that: "Appeals concerning the eligibility of a Native group may be made to [ANCAB] in accordance with 43 CFR Part 4, Subpart J." 41 FR 14739 (Apr. 7, 1976). There is again no suggestion in the preamble to either the proposed or final rulemaking that the Department intended to apply the stricter "property interest" test of standing in the case of a Native group eligibility determination. However, 43 CFR 4.902, as noted supra, arguably applied that test to any appeal of a "determination from which an appeal to [ANCAB] is allowed," presumably including a Native group eligibility determination. In practice though, ANCAB applied the strict test only in the case of land selections under ANCSA, rather than to functionally discrete questions such as eligibility. Compare Walt Hanni, 6 ANCAB 307, 89 I.D. 14 (1982) with Appeal of Chickaloon Moose Creek Native Association, 4 ANCAB 134 (1980), appeal dismissed, Chickaloon Moose Creek Native Association v. Cook Inlet Region, Inc., Civ. No. A 80-207 (D. Alaska July 19, 1982) and Appeal of State of Alaska, 3 ANCAB 196, 86 I.D. 225 (1979). That practice has now been codified in regulation. Effective June 30, 1982, ANCAB was abolished and all of its functions and responsibilities were transferred to this Board. See 47 FR 26391 (June 18, 1982). 43 CFR 2653.6(a)(7) was amended to provide that appeals from Native group eligibility determinations "may be made to the Board of Land Appeals in accordance with 43 CFR Part 4, Subpart E." Subpart J of 43 CFR Part 4 was deleted and the standing test formerly in 43 CFR 4.902 was incorporated into the existing standing requirements of the Board under Subpart E (43 CFR 4.410 (1981)). That test now appears at 43 CFR 4.410(b). However, as noted supra, the test specifically applies only to "decisions rendered by Departmental officials relating to land selections under the Alaska Native Claims Settlement Act, as amended." 43 CFR 4.410(b). Promulgation of this regulation has resulted in a regulatory hiatus with respect to the applicable standing requirement for appeals from Native group eligibility determinations.

We conclude, in the absence of any specific regulation setting forth the appropriate test of standing for appeals from Native group eligibility

determinations, that such appeals should be subject to the test of standing set forth at 43 CFR 4.410(a), which is comparable to the earlier test of standing (43 CFR 4.700 (1972)) applied in the case of Native village eligibility determinations. We will not apply the stricter "property interest" test where there is no such express requirement in the regulations. It is important to also note that, at the time of initial promulgation of the Native group eligibility regulations, an eligibility determination could be made on the basis of an "application for a determination" (43 CFR 2653.6(a)(1)), even before a selection application had been filed identifying land in which a party challenging eligibility would be required to demonstrate a "property interest." See 43 CFR 2653.6(b)(5). Standing would thus have been impractical to adjudicate under such a standard, and could not have been intended.

We turn, therefore, to the question of whether the remaining appellants have demonstrated the required standing 43 CFR 4.410(a). Appellants assert that they are the owners of real property within either the area selected by MNI or MNI's locality. None of the appellants has specified the nature or location of property interests affected by the decision. In the case of MHA, this entity is purportedly composed of members who own real property in the Lake Minchumina area. There is no assertion that the association itself owns any real property.

In his motions to dismiss the various remaining appeals involved herein, the Regional Solicitor contends that the appellants lack standing because they own land which was either not included in the selection area or, if it was included, is private land or land tentatively approved for conveyance to the State and, thus, not subject to the selection. 6/ As a basis for establishing what land is owned by certain appellants, the Regional Solicitor refers to State records which purportedly list the appellants as State lottery winners of various parcels in areas entitled "Minchumina I" and "Minchumina II." The Regional Solicitor asserts that parcels in "Minchumina I" are within the selection area but tentatively approved for conveyance to the State and that parcels in "Minchumina II" are not included in the selection area.

It is unnecessary, in order to decide the question of standing, to determine the precise nature or location of appellants' property interests. Appellants assert that they own real property "at Lake Minchumina, Alaska." The Regional Solicitor does not dispute this assertion. We conclude that this assertion is sufficient to establish that these appellants are adversely affected by the April 1983 BIA decision determining the eligibility of MNI as a Native group, thus establishing MNI's right to select and potentially obtain conveyance of the selected land. There is overwhelming evidence in the record, including statements submitted by members of MHA, that the residents of Lake Minchumina use the land in the area, including the selected

6/ Under section 906(c)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c)(1) (1982), title to land tentatively approved for conveyance to the State is deemed to have vested in the State "as of the date of tentative approval." In the case of State selection F-28722, the date of tentative approval was Sept. 11, 1963.

land, for hunting, trapping, berry-picking, fishing, gathering wood for heating and building, access to property, and as the site of a community center, post office, and an airstrip. We are persuaded that appellants, including MHA, have "interests" in the selected land which are adversely affected by the April 1983 BIA decision within the meaning of 43 CFR 4.410(a), and thus have standing to pursue their appeals. In re Pacific Coast Molybdenum Co., 68 IBLA 325, 331-34 (1982). The Regional Solicitor's motion to dismiss for lack of standing is denied.

[3] We turn therefore to the substantive issues raised by the remaining appeals. Section 14(h)(2) of ANCSA authorizes the Secretary of the Interior to convey land to a "Native group." The term Native group is defined to mean "any tribe, band, clan, village, community, or village association of Natives in Alaska composed of less than 25 Natives, who comprise a majority of the residents of the locality." 43 U.S.C. § 1602(d) (1982) (emphasis added). The statute does not specify as of what time a Native group is required to satisfy the statutory criteria for eligibility, whether at the time of enactment of ANCSA, the date an application for a determination of eligibility or a selection application was filed or some other time. The Department, however, in implementing the statute has required members of a Native group to "actually have resided [at the group's locality] as of the 1970 census enumeration date," i.e., April 1, 1970. 43 CFR 2653.6(a)(5). In order No. 3083 dated June 17, 1982, the Secretary of the Interior made clear that eligibility is "to be determined as of April 1, 1970." 47 FR 30658 (July 14, 1982). Thus, a Native group will be deemed eligible where it is composed of members who "constituted the majority of the residents in the locality on the 1970 census enumeration date." Tanalian, Inc., 75 IBLA 316, 321 (1983).

Furthermore, the statute does not define either "residents" or "locality." However, 43 CFR 2653.6(a)(5) specifies that:

> The Native group must have an identifiable physical location. The members of the group must use the group locality as a place where they actually live in permanent structures used as dwelling houses. The group must have the character of a separate community, distinguishable from nearby communities, and must be composed of more than a single family or household.

In Tanalian, Inc., supra at 320-21, we discussed in somewhat greater detail the meaning of "locality":

> The "locality" must encompass the greater area in which other residents live in relative proximity, as compared with the population density of lands beyond the area so designated. Evidence of the extent to which residents of the area share common interests or concerns in the local amenities, facilities, and services may be received as indicative of the geographic area of the locality. "Locality" has been held to be synonomous with "community." Conley v. Valley Motor Transport Co., 139 F.2d 692, 693 (6th Cir. 1943). It means the place, near the place, vicinity, or neighborhood. Connally v. General Construction Co., 269 U.S. 385 (1926).

In the present case, BIA conducted field investigations, and compiled a record documenting its conclusion that MNI meets the requirements for eligibility as a Native group in accordance with 43 CFR 2653.6. Appellants offer statements, affidavits, and exhibits to evidence that BIA's determination is factually incorrect, with respect to its conclusion that the MNI comprised the majority of residents of the community as of April 1, 1970, and that MNI is a separate community in the Lake Minchumina area. MHA also asserts that the exterior boundaries of the MNI locality is improperly described by BIA, and excludes residents within the community. Appellants have thus raised material issues of fact concerning the BIA eligibility determination which if proved true would require a reversal of the BIA decision. We conclude that these factual disputes require resolution at a hearing. Coronado Oil Co., 42 IBLA 235 (1979).

This matter is therefore referred to the Hearings Division, OHA, for a hearing before an Administrative Law Judge on the issue of whether MNI meets the requirements for eligibility as a Native group under 43 CFR 2653.6. Appellants will have the burden of establishing by a preponderance of the evidence that the BIA decision is in error and that MNI is not entitled to a certificate of eligibility as a Native group. The State may be allowed to participate in the hearing and subsequent proceedings as a third party intervenor. See United States v. United States Pumice Co., 37 IBLA 153 (1978), appeal dismissed sub nom. The Wilderness Society v. Andrus, Civ. No. 79-0296 (D.D.C. May 30, 1979). Any other persons or organizations may be permitted to intervene in the proceedings if they are able to establish the requisite status as an intervenor; alternatively, participation as amicus curiae may also be allowed. At the conclusion of the hearing, if the Administrative Law Judge determines that appellants have failed to establish by a preponderance of the evidence that the BIA decision is in error, he shall affirm BIA's April 1983 decision certifying MNI as an eligible Native group. Otherwise, he shall reverse the decision. Any adversely affected party may, of course, appeal to the Board pursuant to 43 CFR Part 4, Subpart E.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeals in IBLA 85-312, 85-313, 85-314, 85-316, 85-317, 85-321, 85-322, 85-323, 85-329, 85-335, 85-336, and 86-362 are dismissed, and the remaining cases are referred to the Hearings Division, OHA, for assignment to an Administrative Law Judge for further action consistent herewith.

Gail M. Frazier
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

C. Randall Grant, Jr.
Administrative Judge.